WHETHER A GRANT BY DEED OF A FISHING OR HUNTING RIGHT IS LIMITED IN ITS SCOPE TO THE CONDITIONS WITHIN THE VIEW OF, AND SURROUNDING THE PARTIES AT THE DATE OF THE DEED, OR IS TO BE CONSTRUED RELATIVE TO THE ADVANCEMENT OF SOCIETY AND THE IMPROVEMENT IN FACILITIES AFFECTING THE EXERCISE OF THE GRANTED RIGHT? *Alexander H. Robbins.* 62 Cent. L. J. 238.

"WITHOUT PREJUDICE." *Anon.* Showing the interpretation of this phrase by English judges, when it has been used in correspondence between litigants. 70 Sol. J. 372.

WORKMEN'S COMPENSATION AND EMPLOYERS' LIABILITY IN BELGIUM, ENGLAND, FRANCE, AND ITALY. *G. de Leval, R. Newton Crane, B. H. Conner, Henry Burnham Bonne.* 18 Green Bag 216, 220, 223, 225.

II. BOOK REVIEWS.

ENGLISCHES STAATSRECHT, mit Berücksichtigung der für Schottland und Irland geltenden Sonderheiten. Von Julius Hatschek. 1 Band: Die Verfassung. Tübingen: J. C. B. Mohr (Paul Siebeck). 1905. pp. xii, 669, 4to.

This book is part of the monumental "Handbuch des Oeffentlichen Rechts," projected more than a score of years ago by Professor Marquardsen and designed to cover, in a series of monographs by different writers, the political institutions of all civilized countries. Many volumes of the series have already appeared, varying no doubt in excellence, but as a rule of great value, and Dr. Hatschek's book deserves from the author's vast learning, thorough research, and analytical thought, a high place among them. To say that one does not always agree with all his conclusions, to feel that he sometimes pushes them too far, is, perhaps, merely to say that they are often new and striking.

The book before us, which is only the first volume of his work on the English government, deals with the constitution, or rather with the fundamental legal institutions, and is for that reason of special interest to lawyers. Naturally he approaches the subject from the point of view of a German jurist, and with his mind full of ideas of scientific jurisprudence and administrative law, which illuminate, even if at times they slightly distort, the image. Such a treatment enlarges the horizon of the student of the Common Law, by helping him to distinguish those legal conceptions which are of universal application from those which are peculiar to his own system. But while many books upon the English government have been written by foreigners, most of them have had a serious defect. Professor Hatschek points out (p. 23 *et seq.*) that almost all continental observers have studied English institutions when a crisis was present or threatened in their own country, deducing those principles which they believed were needed at home; and he shows how this was true of Montesquieu with his doctrine of the separation of powers, and of Gneist with his ideas of the nature of self-government. From such a source of error Professor Hatschek himself claims to be, and is, free; his examination having a purely scientific, not a political motive.

He lays great stress, and most properly so, upon the fact that the Roman Law was not adopted in England at the time of its general "*rezeption*," as the Germans call it, by the continental nations; and to this cause he rightly attributes a great part of what is characteristic in the legal thought and political institutions of the nation. For that reason England has, he says (p. 10), never had a systematic legal theory of the state; and in the sense of the German "Staatsrecht" that is true. Between the writers on politics and jurisprudence on the one hand, and the lawyers on the other, there has been, he tells us (pp. 13, 14), a cleft which began with the decay in the study of Roman Law early in the seventeenth century, and has never been bridged. He adds that continental observers have made the great mistake of supposing that the English political philosophers like Hobbes, Locke and the rest were expounding English "Staatsrecht" when they were really out of touch with the law, —

a difficulty which hampered Bentham also in his efforts to construct an ideal legal system (pp. 30, 31).

In the next, and perhaps the most interesting chapter of the book (Kap. II), Professor Hatschek takes up the English law of corporations, and turns upon it a flood of light from Gierke's researches into the mediæval conceptions of communities. That part of Professor Gierke's work bearing upon the political theories of the middle ages was translated, and furnished with an introduction, by Professor Maitland a few years ago; and Professor Hatschek concurs in their views. He draws a sharp contrast between the mediæval German free community, with its independent corporate rights or privileges, with its power of organizing and directing itself, and of ruling its own members, and the English local body, without a true corporate character or essential corporate rights, but with common duties, and with its organization and the functions of its officers prescribed in the main by the law of the realm. The German law lacked, he says, the objective conception of a binding rule; it lacked Austin's fundamental quality of command coupled with a sanction. It appeared as a mass of subjective rights or liberties, as a series of claims or privileges of different elective bodies against each other, and hence German history is a battlefield of such bodies struggling together. In England, on the other hand, the local bodies were regulated by a national law administered by the royal judges, and thus the country was a consolidated realm with an orderly use of local communities for purposes of state. It was only at the close of the middle ages that the towns began to acquire by means of charters the power to own property as formal corporations, while for the other local bodies the place of this was supplied by the device of treating their officers as holding property in trust for them. The law of corporations grew under the Tudors, who used it both in the case of the towns and of the trading companies, to increase their own power; by treating all such bodies as institutions of the state. With its growth two principles became firmly established, one that a corporation aggregate could be created only by the Crown, the other that it could do only those things which it was specially empowered to do, — the doctrine familiar to-day under the name of *ultra vires*. Professor Hatschek adds that the theory of corporations even after its development in the nineteenth century by the Municipal Act of 1835, and the Companies Act of 1862, is still behind that of the continent, based upon the Roman and Canon Law.

In England the state itself was never treated as a corporation, and although the Crown came, like the bishop and the rector, to be regarded as a corporation sole, its authority was not a unit, but built up out of a mass of separate prerogatives; and this, Professor Hatschek tells us, is the reason for the absence of that general liability on the part of the Crown for the acts of its officials, which under the name of "*Fiscus*" attaches to the continental state. The absence of liability has had, he believes, a certain advantage; for as the Crown was not responsible for its officials, they have been liable for their own acts, with the result that every police officer or collector does not look upon himself as the incarnation of the state, a condition that has helped to preserve the individualism of the people. Moreover, the state, he adds, not being a corporation has never been regarded as omnipotent, like the continental state, and except during the Tudor period has never possessed an all-embracing police power (p. 93).

Professor Hatschek has a great deal to say about the relation to each other of common and statute law. He insists that a statute had originally simply the effect of a judgment; and is still in the nature of an amendment of the Common Law (pp. 95–98, 113 *et seq.*), so that whereas continental judges are strictly bound by a text which purports to cover the whole of the law, English statutes have in them gaps which the judges fill up from what is really a "naturrecht" (p. 154). This is an unusual way of putting the matter, but by no means an incorrect one, as Sir Frederick Pollock has shown in his articles on the History of the Law of Nature.[1] A man bred in the Common Law abhors the former

[1] Journal of the Soc. of Comp. Leg. 1900, No. 3; 1901, No. 2; s. c. 1 Columbia L. Rev. 11; 2 *Ibid.* 131.

German idea of "*naturrecht*" as a transcendental or scientific system of jurisprudence distinct from, or even at variance with, positive law. But he is not less opposed to a complete code which leaves no opportunity for judge-made law. The fact is that a transcendental system of jurisprudence and a code are not far apart, the code being a natural attempt to enact the ideal system and make it into positive law. Now the votary of the Common Law has no faith in any abstract scheme of jurisprudence perfect for all times and ages; but he conceives of the Common Law as founded upon, and constantly refreshed by, principles of natural justice. He believes in natural law, not in a form of a system to be excogitated by jurists apart from positive law, but as a general sense of justice in the court to guide it in the decision of doubtful cases.[1] Professor Hatschek refers to this point in discussing judicial legislation (pp. 101-5), and remarks that the search for legal analogies in English law differs from the same process on the continent only because it is done by counsel and judges in the course of deciding in actual cases, instead of being done by a scholar in the study of theoretical jurisprudence. But on account of these conditions under which law is evolved, he contends that the standard of juristic thought is higher on the continent, and that Sir Frederick Pollock is wrong in regarding case-law as a science.

When the author comes to the conventions of the English constitution he expresses views which reveal the great gulf between the conception of the nature of law held by Anglo-Saxon and continental writers. He argues (p. 543 *et seq.*) that these conventions are in reality rules of law, because, as Professor Dicey has pointed out in his Law of the Constitution, a violation of them if persisted in will almost inevitably lead to a violation of positive law; and therefore, contrary to the prevalent notion that the cabinet is unknown to the law, he concludes that the parliamentary executive, as he calls it, or, in other words, the cabinet in its relation to Parliament, is a legal institution. In the course of his argument (p. 546 note), he quotes Professor Dicey's statement that the conventions of the constitution are not laws because they are not recognized by any common law court, and says, "Even if this were true, is not the House of Commons a court?" To discuss the meaning of terms is usually a weariness of the flesh. But surely we have here what Kipling would call an error in the fourth discussion. There is a difference in fundamental conceptions that excludes a common standing ground. To the Anglo-Saxon, law means those rules which are enforced, or at least recognized as valid, by the courts of law. To the continental jurist it has no such limited significance. It includes rules enforced by tribunals of various kinds, or even by no tribunal at all. To the German or the Frenchman administrative law is not the less law because it is not within the jurisdiction of the ordinary courts; and the legal character of constitutional law does not depend upon the authority of some tribunal to disregard a statute enacted in violation of its provisions. Professor Dicey is perfectly right in saying that conventions of the constitution do not fall within the English conception of law, and Professor Hatschek may well be equally right in maintaining that they are true rules of law according to the German conception; but argument on the subject is fruitless until we agree upon a definition of law. The distinction should, however, be kept constantly in mind while reading what a German scholar tells us about English "Staatsrecht," for if not, one is liable to misconceive his meaning.

There are many other new and interesting things in this book, such, for example, as the history of the introduction into England in the thirties of the French method of making up the public accounts. This was based on double entry, and made it possible for the first time to present a really lucid statement of the national finances. But in a review of this kind it is impossible to do more than touch upon a few of the chief points that attract attention, and the reader who is interested in the subject can only be referred to the work itself.

A. L. L.

[1] In this connection it is curious to compare with the articles already noted Sir Frederick Pollock's earlier contempt for natural law in his review of Lorimer's Institutes of Law: Essays in Jurisprudence and Ethics (p. 18 *et seq.*). Yet his two views are not really inconsistent.